IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

J. MICHAEL CHARLES; MAURICE W. WARD, JR.; and JOSEPH I. FINK, JR., on behalf of themselves and all others similarly situated Plaintiffs, v. PEPCO HOLDINGS, INC.; CONECTIV, and PEPCO HOLDINGS RETIREMENT PLAN, Defendants	:	CIVIL ACTION NO. 05-702 (SLR)

APPENDIX TO DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE AN EARLY MOTION FOR SUMMARY JUDGMENT

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Dated: February 16, 2007

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vs.	:	
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- - -

Wilmington, Delaware
Thursday, October 26, 2006
11:30 o'clock, a.m.

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BEFORE: HONORABLE SUE L. ROBINSON, Chief Judge

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P R O C E E D I N G S

(Proceedings commenced in the courtroom, beginning at 11:30 a.m.)

THE COURT: Good morning, counsel.

(Counsel respond, "Good morning, your Honor.")

MR. NAYLOR: Good morning, your Honor. Zachary Naylor, Chimikles & Tikellis, for plaintiffs.

If I may just start by way of introduction, I'm joined by James Malone of our Haverford office, who has been admitted in this case, and with your Honor's permission, will speak on behalf of the plaintiffs today.

THE COURT: All right. Thank you very much.

MR. MALONE: Thank you for the privilege of appearing, your Honor.

THE COURT: Sure.

MR. WOOD: Good morning, your Honor. Larry Wood appearing from Pepper Hamilton for the defendants in the matter. I'm also joined today by my partner, Susan Hoffman, who has also been admitted pro hac vice in this matter and we'll sort of do it together, if that's appropriate.

THE COURT: That's fine. Thank you very much.

MR. WOOD: Thank you.

MS. HOFFMAN: Good morning.

THE COURT: All right. Why don't we start with Mr. Malone and plaintiffs' counsel and the areas -- it would appear as though there's a general dispute about the scope of appropriate discovery, but I will let you lead me and we'll see what we can do.

MR. MALONE: I think that's fair. We had a telephone conference in September, when we first started to discuss the scope of the defendants' objections, and at that time I came away with a clear sense that we were probably going to have a dispute, but it wasn't really ripe yet because we didn't have any documents at the time. And now we have what we've been told is what they intend to constitute their entire production of documents.

And I think the areas that are in dispute, if I would summarize, one big picture area is the area of

discovery into the background of decision-making on the plan design.

The defendants, as I understand it, take the position that, look, you've got the final version of the plan, that's what controls your clients' rights. You are not -- it's not relevant what led us to make the decisions about that because those are sponsor decisions. You can't attack them as fiduciary breaches.

Our view of it is somewhat different. We view the design issues as relevant in two different contexts. On a broad basis, we view it relevant to the issue of remedies. And the issue of remedies is probably best crystallized by the 1978 Supreme Court case, City of Los Angeles versus Manhart, which is 535 U.S. 702.

What happened in Manhart was this: There was a pension plan which called for contributions from the employees that was sponsored by the City of Los Angeles. Women were charged more than men on the theory that, statistically, they were more likely to live longer lives. The women did not like this. They filed a suit under Title 7.

The District Court ruled that this was a violation of Title 7, charging the women more to participate in a pension plan than the men, and it ordered that all those payments be disgorged.

What happened, however, it worked its way up to the Supreme Court and the Supreme Court said, yes, you're right. It is discrimination, but the ruling is new, it's novel, it's unanticipated. So we don't think it would be fair and appropriate, in structured and equitable relief to impose on the plan and its responsible source the obligation to go back and undo that, that we will make the relief prospective only.

And that theme, then, came up in the IBM case, where the defendant argued the same thing. They were not successful then, but at the end of the day they won in the Seventh Circuit on the merits, so we don't know what the Seventh Circuit would have done on this issue.

So, to us, on the issue of remedies, good faith, what your expectations are, some discovery into why was this design adopted? Why is it that the management workers have the cash balance design, but the unionized workers don't?

It seems relevant to what the employer's state of mind was in adopting the plan and could serve to rebut a contention that we acted completely in good faith, we're shocked and astonished that our plan violates the law.

The second area where we see this to be relevant is narrower. It has to do with the claim under 204(h). And

under 204(h), that's the notice requirement. And basically, we've looked at the Treasury regs that were in place at the time that this conversion took place, and under those regulations, what they indicate is that notice is a requirement for an amendment to a defined benefit plan only if it is reasonably expected to change the amount of future and/or benefit accruals.

So, again, in that context, we see some relevance to what was the sponsor told by its consultants, for example, about what the impact of this benefit change would be. What were their expectations in terms of cost savings, because that's, under the Treasury rules, appears to be what triggers their notice obligation.

The other big picture area where we have a dispute I think is the extent to which we as plaintiffs should have access to drafts, and we've basically asked for access to drafts in two areas that we think are important: One is the drafts of the cash balance plan itself. We think learning and understanding to some degree, detail, how that evolved is relevant for the same reasons that we think that the discussions of design are. That basically they're going to tell us something about state of mind, structure, expectations.

The other area where we've asked for the drafts is in connection with the employee communications because

we'd like to understand how these revolve.

Now, what we have on the plan side is we have minutes of a committee meeting of the board of Conectiv, where they discuss a number of different structural benefit changes and they receive an outline of proposed terms of the plan, very brief, ten lines, and they approve that, and then we have the final plan document itself. We think it's appropriate to test through discovery how we got from that narrow document to the 30, 40 page document that actually governs.

The other area where we'd like to explore drafts in some degree, detail, is the communications that went out to the employees, what they were told, how that process evolved, what decisions were made and what the employees should or should not be told. Those are the big picture areas.

There are some minor areas where we think there are gaps in production that I don't think we need to bother you with today because I think we should just talk those over and it may be they simply don't have a document that I think they should have. But that's how I would frame the big picture issues that I think we are disputing.

THE COURT: All right. Thank you very much.

Let's hear from defendants' counsel with respect to the two major issues, and then if the defendant has any

concerns of their own, then I would like to hear those as well.

MR. WOOD: May I stay here, your Honor, or do you think I won't be picked up on the tape?

THE COURT: We don't have tape. We have a real person, and as long as Valerie can hear you, then I don't mind if you stay there for discovery.

MR. WOOD: Thank you.

THE COURT: I will limit it to that.

MR. WOOD: Okay. Fair enough.

I guess I'd just like to start with one thing that Mr. Malone said that I think really hits the nub of what the real dispute is here, and the discovery dispute is just a necessary corollary of the dispute. He said that they would like to get this information because they think it relates to plan design. That was also in the plaintiffs', the supplemental discovery statement.

The plan design issue is really the one that was at the fore in the Cooper case, is: Is a cash balance plan design inherently age discriminatory? Cooper rejected that. The Seventh Circuit said there was nothing, there's no age discrimination component to that plan design. And then Congress, under the President, adopted the Pension Protection Act, which says that as of August 18th of '06, it is for sure there's no discrimination on a going forward

basis.

So that is the count in the complaint, Count 3, that your Honor has stayed, pending the decision in Register. Register was a decision of the Eastern District of Pennsylvania, where Judge Davis found that there was no claim under 204(b)(1)(H), the age discrimination claim, the plan design claim.

So what we're left with are three nonstate claims. One is a back-loading claim that is a simple formulaic test based on the plan language. No discovery is even needed for that. We've cited a couple of cases in our supplemental statement where Courts have, in fact, made that decision on the basis of the plan itself.

Then the second claim they have is the claim under 204(b)(1)(G), and, again, that's a plan-related claim. What is the language of the plan say and does it violate ERISA?

And then their last claim is the 204(b)(1)(H) claim -- 204(h) claim. I'm sorry. It has two essential components. One is a notice component and the other component is notice isn't even necessary unless at the time the plan was adopted, there was, in fact, a significant reduction in the rate of future benefit accrual.

And we did also cite to your Honor a case, Konig versus Intercontinental, 880 F. Supp. 372, Eastern District

of Pennsylvania, 1995. And in that case, the Court stated on the 204(h) claim, quote, "ERISA does not ask why this amendment was made, it asks only was there an amendment and did it result in a significant reduction in the rate of future benefit accrual."

Defendants have produced a substantial number of documents that relate to all of the plan documents, the summary plan description documents, the annual report form 550's, employee communications, as well as the individual participant account statements.

So discovery has been provided that enables the decision to be made today. I understand it's not briefed --

THE COURT: Thank you.

MR. WOOD: -- on all of the nonstayed claims.

And I guess where the real dispute is, when we were on our conference call in the original scheduling order, we were talking about do we divide class certification discovery from merits discovery, and the idea was, let's try to not bicker about what discovery fits into which bucket. And now we're at the point where we're bickering about what discovery fits into the nonstayed claims versus the stayed claim, which is the Cooper claim.

And I think the thing that we would like to suggest as an efficient and cost-effective way to deal

with this is, if we assume that, make it in two assumptions. If you assume that the Third Circuit looks at Register and affirms, and so there is, in this circuit, there is no age discrimination claim under 204(b)(1)(H), the stayed claim, than we're exactly where we are today.

If the Third Circuit were to reverse the Register decision, all of the discovery that Mr. Malone seeks or probably a goodly portion of the background-type information he describes would be relevant to that claim.

So we're sort of at a position where it seems to make sense that we either stay the entirety of the case pending the Register decision because that will allow either discovery to proceed or not, or if we could file early summary judgment motions on the three nonstayed claims, and to the extent that the plaintiff thinks that any additional discovery is necessary, Rule 56(f) provides that mechanism and they can supply an affidavit, et cetera, in terms of what other discovery they need on the nonstayed claims to defeat the summary judgment.

THE COURT: All right. Well, I do not --

MR. MALONE: May I respond?

THE COURT: Let me ask questions.

MR. MALONE: I'm sorry.

THE COURT: I don't do early summary judgment, for a couple of reasons. Number one, I've got such an

incredibly large motion practice, particularly when they are patent litigation, that the last thing I want is to go through a motion practice in a case only to have the nonmoving party say, oh, but the record isn't complete and I'm confident there's discovery out there. That is a monumental waste of my time and of your client's money.

So I don't generally do that unless there are stipulated facts and it's really an issue of law and I'm happy to do it then.

how long has the Third Circuit had this case? I mean, are we expecting a decision momentarily?

MR. MALONE: I have not checked recently, but I know it has been fully briefed for several months. I don't believe it has been listed for argument, your Honor, but I will have to confess, it has probably been a couple weeks since I checked the docket.

MR. WOOD: That's to the best of my recollection as well.

THE COURT: And fact discovery is a long ways off?

MR. MALONE: July I believe is the cutoff.

MR. WOOD: Right. In this case.

THE COURT: Because what I was anticipating you were going to say is that we should give this discovery dispute a few more months because if the Third Circuit

reverses and even the defendants believe this discovery would be relevant under those circumstances, that the discovery dispute would go away because this discovery would be made available without further discussion.

Now, I am not sure how that affects the discovery schedule here, but that was what had crossed my mind in terms of what you might say.

Let's set that aside for a moment.

With respect to -- I think you certainly addressed your position with respect to the notice requirements of 204(h). You didn't necessarily, at least I didn't understand you to specifically address the whole remedies argument that was made. That seems to me there is a distinction between the two arguments.

MR. WOOD: Again, the remedies argument is one that the plaintiffs even recognize was at the forefront of the Cooper case and Mr. Malone described it fairly eloquently when he said the issue is all of a sudden, there's liability created when nobody ever thought it could have existed, and that was exactly the Cooper decision.

And since that case was reversed and there was no age discrimination and that's the one Register has, we actually agree. I mean, I agree completely with your Honor, that would be the most appropriate and most cost efficient and effective way to deal with this, would be to

just put this off until the Third Circuit rules.

THE COURT: Or for some period of time until it becomes unreasonable in light of the schedule to wait for the Third Circuit to rule.

MR. WOOD: Right. If I may interrupt you for one second?

THE COURT: Yes.

MR. WOOD: I'm sorry. I have terrible allergies today.

THE COURT: Well, this building is not a healthy building, so it's not surprising.

MR. WOOD: For instance, the first count, the back-loading count, the plaintiff even recognizes in the complaint at Paragraph 45 that it's the -- and, again, Mr. Malone, I will sort of jump topics for a second, he referenced union plans. The only plan that's at issue in this case is the cash balance subplan. And even in their complaint on Page 1, the plaintiffs state that, as plaintiffs demonstrate below the Conectiv cash balance subplan violates ERISA. That's what is at issue, not union plans, not any other type of plans.

In Count 1, they say that the cash balance subplan does not satisfy the tests, and that goes back to the formulaic approach. It's the plan language. You have the tests provided for in the regs. You run the math

and you determine whether there was a back-loaded violation. No amount of discovery changes that and that's what the case say when they decide it on the basis of the face of the plan.

So that's why we were sort of betwixt and between. No additional discovery is needed on the three nonstated claims, but discovery would still be needed on the stayed claim if that ever came back to life.

THE COURT: All right. Thank you.

Let's go back to Mr. Malone.

MR. MALONE: I will be brief, your Honor.

I think on the point of remedies, my colleagues are correct, that the in the Cooper case, the blindside issue of liability was briefed on the issue of remedy, but my point is this: I don't think that's simply an age discrimination issue.

When the Supreme Court dealt with it in Manhart, they talked about it in terms of what is the scope of appropriate equitable relief. That really shouldn't be a surprise to us given traditional equitable principles or a chance to look at the totality of circumstances and try and come up with a fair decree.

My expectation would be that the same issue of expectations, what were you told by your consultants about this plan design, would be equally relevant if, for example,

we prove that it violates the anti-back loading rules. Did they know that that was an issue? We've seen some indication in documents that the defendants acknowledged that this form of design was controversial.

So I think the remedy issue isn't simply 204(b)(1)(H), and I think if, for example, the Third Circuit decides that Judge Easterbrook was right in the Cooper case, we are still going to be talking about whether or not the defendant got blindsided here. And so I think that this issue remains relevant in the case.

Turning to the 204(h) notice issue for a second, your Honor can read the case when you get a chance, but what you need to understand about the Konig case was the issue of good faith and expectations was a little different than what we're talking about when we quote the Treasury regulation.

What happened in Konig was the defendant was arguing that the Court should disregard one of a series of amendments in assessing whether it violated 204(h). They had an amendment in 19 -- plan in 1988. It was amended in 1989 and subsequently. And they said, well, the intervening amendment, that was only intended to deal with some tax law issues that we expected to occur and they never occurred, so you shouldn't pay any attention to that.

And it's in that context that, you know, as the

Court describes in footnote 4, defendants argue that the IIP 1989 plan was in effect for only one year because the anticipated impact of the tax law changes was incorrect. They complained the more accurate comparison was between the IIP 1988 plan and the ILC 1989 plan, and it's in that context that the Court goes on to say that defendants' argument assumes something about 1054(H) that's not in the statute. Namely, that a good-faith amendment or an amendment based on faulty assumptions or incorrect interpretations is exempt from the notice requirement.

What we're saying is that based on the Treasury regulation, Treasury Department being the agency responsible for construing this part of the statute, that the plain language of the regulation says there has to be an expectation that the amendment will result in lower benefit accruals to trigger the notice requirement. So I look at that and I say I'm the plaintiff, I think I have the burden of proof on that issue, and that is how I would respond to those two issues.

THE COURT: All right. Thank you.

MR. WOOD: Your Honor, may I have a small rebuttal?

THE COURT: Yes.

MR. WOOD: I will address a few points. The Konig case was actually litigated by Ms. Hoffman.

Getting to the point of remedy, Rule 26 defines what's relevant in terms of discovery, discovery that's relevant to a claim or defendants.

What Mr. Malone is raising is something that happens after the case is over, when you say, oh, my gosh, look what happened, there's a new rule of law and it's not fair. Again, that was Cooper. It's not any of these other claims. If there's a back-loading violation, there's a back-loading violation, and the plan has to be changed. Those are strict ERISA requirements.

THE COURT: All right. Well, I guess I'm not quite sure I understand what you are saying. Generally, damages, I mean, damages, unless you bifurcate damages, that evidence is generally --

MR. WOOD: I'm sorry, your Honor. It's not a question of damages. It's a question of an escape hatch from damages, and that's not what is at issue here. It hasn't even been raised. It couldn't possibly be raised because the case hasn't been litigated. But, again, that's what was at issue in Cooper and that's where it would be an issue if that claim were still in existence in this case.

In any other normal case, if there were a single back-loading claim filed, you'd never see anybody trotting to court saying, well, there's a remedy, and so for an injunction case, because a remedy -- because remedies could

be a way to avoid an injunction or damages, therefore, I get broader discovery than is permissible by the rules and that is not the way the law is.

THE COURT: You're saying it might be relevant, but it is not relevant now?

MR. WOOD: It's not relevant to the three nonstayed claims, correct.

THE COURT: Until they're resolved?

I guess what I'm trying to figure out is what you're saying is this discovery with respect to at least the back-loading claim is premature?

MR. WOOD: That's correct. And then Susan Hoffman would like to just talk quickly about the Konig case.

THE COURT: All right.

MR. WOOD: Thank you.

THE COURT: No need to talk quickly.

MS. HOFFMAN: With your permission, your Honor, I'm sort of the substantive technical person here.

I represented the defendant in the Konig case and the issue there was that there was, if you might want to call it, a secret plan amendment. There was a -- there was a plan amendment that was adopted by the buyer of a business because the seller told them that would be the formula that would be in effect for this group in the seller's plan ones the new

tax laws took effect.

So that's the formula the buyer adopted, but they never told any of the employees about it because they never got around to sending any notices.

Then, the seller, it turned out, didn't adopt that formula. They adopted a different formula. The buyer's plan was changed to reflect that formula and that's the one the participants found out about.

There was a reduction from the interim formula to the final formula but no reduction from the old formula to the final formula. So our defense was you have to look at employee expectations. They never knew about this interim formula, so how can you -- 204(h) is designed to deal with employee expectations,. They're disappointed. We lost. And we lost because the judge said it does not matter whether anyone knew about it or not. It does not matter whether anyone thought there was a reduction or not. You look at the formula before, the formula after, and that's how you tell if there's a significant reduction.

That was the Konig case.

Mr. Malone cites a regulation that says you need to give a notice if it's reasonably expected. Reasonably means a reasonable person looking at the formula. If I'm badly advised and I adopt a formula that cuts benefit accruals by half, but I don't expect that,

it's not a reasonable expectation not to expect that and a notice would be required whether I thought it was going to happen or not.

On the other hand, if I am badly advised and I think there's going to be a reduction by half but it turns out there is an increase and I don't give a notice, there's no violation just because I thought there would be a reduction. You need to have a significant reduction in the rate of future benefit accrual, and that's formula to formula. Expectations have nothing to do with it.

On the back-loading issue, a plan has to satisfy one of the rules. In a back-loading case, the remedy is to restructure the plan to satisfy one of the back-loading rules, and it may be, if they were to succeed in showing that this plan violated a back-loading rule, that the parties would then present options for the Court to restructure the plan to comply with ERISA, and then the plaintiffs would have a claim under the restructured benefit plan.

You don't ordinarily get damages in an ERISA case because it's equitable relief. You get, in this type of case, a restructuring of the plan to satisfy the rules. And the issue in Cooper was, is the restructuring of the plan to give everybody the most valuable accrual rate that the youngest person got? That would have been the enormous amounts of damages that everyone was bandying about. But,

again, that only applies on those age discrimination counts. The three nonstayed counts here, back-loading and this reduction in benefit caused by the change in interest rates, those are nowhere near the scope of the types of remedies at issue with the age discrimination count.

One final mention. We do have third-party subpoenas here, which are as broad as the dispute between the parties, and I don't want the Court to overlook the fact that one of our goals is to try to prevent sort of a fishing expedition on the part of, you know, of the third parties, which were the various actuarial advisors the employer had.

THE COURT: All right. Thank you very much.

MS. HOFFMAN: Thank you.

THE COURT: Mr. Malone?

MR. MALONE: Yes, your Honor. The only comment I have is that I should alert the Court that while there are third-party subpoenas, they are not issued from this district. One was issued from the Eastern District of Pennsylvania, the other from the district of the District of Columbia. So I'm not sure that, even if we get to the point of briefing motions in this case on this discovery dispute, I'm not sure this was the right court to do that because Rule 45 explicitly says that that is the dispute that has taken the Court that issues the subpoenas -- subpoena.

THE COURT: Surely, but one also likes to think

that if a judge in the court in which the case is being litigated opines about the appropriate scope of discovery, that parties will listen regardless of where the subpoenas are sought.

It seems to me, quite frankly, Mr. Malone, that it is not at all clear that your request for this broad scope of discovery is relevant at this stage and I am inclined to hold off on this until the Third Circuit speaks, although I am not going to give the Third Circuit until the end of discovery, but I would like to give them a little more time because I don't believe in making decisions unless I have to.

I think the defendants have indicated that they don't contest the fact that it would be relevant if the Third Circuit ruled one way. I guess we're back where we are if the Third Circuit doesn't rule that way. So I don't know whether putting anything off makes any sense.

I don't think I need briefing. You've both given me positions in your discovery papers. I might think about it a little bit longer and issue a short decision.

MR. MALONE: Thank you very much for your time.

MR. WOOD: Could I just add one point?

THE COURT: Yes.

MR. WOOD: I do recognize that the Court doesn't like the early summary judgment motions and, in fact, most

courts don't, but if we get to that point where the Third Circuit affirms Register and we're back here in a couple months, it was just a suggestion that we've utilized effectively with some other courts before to control discovery that is marginal at best and then you get a real edition quickly on the scope and just move forward.

If summary judgment is available at that point, then that's even better for the Court, for the parties. It cuts the cost and expense.

THE COURT: My only hesitation with that when the parties don't agree to facts is that, quite frankly, again, with the motion practice I have, I jump into a case once and I just can't promise that I will get to your motions any sooner than if you waited until the end of discovery, and that's my hesitation, is that you tell me these things, you file your motions, and then I've got trials coming up that I have a deadline to issue the summary judgment decisions and I don't do you any favors.

But certainly we can talk about it again. I will try to get a decision out within the next week based on your argument. And I think you are all very articulate and it's a pleasure to hear you. And if other discovery disputes arise in the meantime, again, I don't like a motion practice. I would rather you e-mail my chambers and particularly if you agree that there's a dispute, then I'm happy to meet with you

again. All right?

MR. WOOD: We apologize for filing a motion for protective order. It was sort of protective from the third-party discovery.

THE COURT: And I have to say I need to change my language to make it clear. I say no motions to compel. Obviously, a motion for protective order is just the reverse side of it. It is a discovery-related paper. I would rather talk to people than look at more paper.

All right. Thank you very much.

(Counsel responds, "Thank you, your Honor.")

(Hearing concluded.)

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CERTIFICATE OF SERVICE

I, Phillip T. Mellet, hereby certify that on February 16, 2007 a true and correct copy of the foregoing Motion for Leave to File an Early Motion for Summary Judgment, Opening Brief, proposed Order, and appendix were served via ECF on the following:

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